In the Court of Appeals of the State of Alaska

Christopher Cleveland, Appellant, v. **State of Alaska,** Appellee.	Court of Appeals No. **A-13181 & A-13182** **Order** Reconsider Single-Judge Order
Calvin Akeya, Appellant, v. **State of Alaska,** Appellee.	Date of Notice: **4/22/2019**

Trial Court Case No. **2KB-15-00419CR & 2NO-14-00193CR**

[Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.]

Alaska Appellate Rule 521 authorizes an appellate court to relax or dispense with a rule of appellate procedure — such as a filing deadline — if strict adherence to the deadline will work injustice. However, Appellate Rule 521 also states that, "in a matter involving the validity of a criminal conviction or sentence," the rule "does not authorize an appellate court . . . to allow the notice of appeal to be filed more than 60 days late." *See also* Appellate Rule 502(b).

The question presented in these two cases is whether this Court has the authority to accept an appeal that is filed more than 60 days late when the attorney representing the defendant declares that the lateness of the appeal is due entirely to the attorney's ineffective assistance — *i.e.*, due to the attorney's improper neglect of the

defendant's case.

The State contends that even when the attorney's improper neglect of the case is undisputed, this Court has no authority to accept the late-filed appeal — that, instead, a defendant in these circumstances must file an application for post-conviction relief in the trial court, asking the trial court to find counsel ineffective and to authorize the filing of the appeal.

For the reasons explained in this order, we reject the State's position that a defendant's only remedy in these circumstances is to petition the trial court for post-conviction relief. Rather, we hold that an appellate court has the authority to grant the defendant's motion to accept a late appeal when the undisputed facts establish that the defendant is entitled to such relief. Thus, absent notice from the State that it intends to contest the underlying facts in these two cases, we will grant the motions for late-filed appeals in both of these cases.

Underlying facts

The underlying claims of attorney neglect in these two cases are virtually indistinguishable. The Office of Public Advocacy was appointed to represent Cleveland and Akeya in their criminal cases. The Office of Public Advocacy contracted with the law firm Gazewood & Weiner, who in turn contracted with attorney Robert S. Noreen to handle this representation. Attorney Noreen represented both defendants at their trials.

According to Noreen's later submitted affidavits, both defendants requested that Noreen appeal their case. However, despite these requests, Noreen failed to file a timely notice of appeal in either case. Noreen provides no explanation for this failure

other than his own neglect and "procrastination." Noreen attributes his neglect to moving residences and to time spent unsuccessfully negotiating with Gazewood & Weiner and the Office of Public Advocacy for greater compensation for his services.

In June 2018, Noreen finally filed a motion to accept late-filed notice of appeal in both cases. By this point, the notices of appeal were well outside the 60-day limit established by Appellate Rule 521. The judgment against Calvin Akeya was distributed on May 17, 2016, making Noreen's notice of appeal in that case two years late. The judgment against Christopher Cleveland was distributed on March 15, 2017, making Noreen's notice of appeal in that case almost fourteen months late. The motions to accept late-filed notices of appeal in Akeya's and Cleveland's cases were accompanied by Noreen's affidavits, in which he affirmed under oath that both Akeya and Cleveland had timely requested an appeal in their cases and that neither Akeya nor Cleveland were responsible for the resulting delay.

This Court responded to these pleadings by ordering a supplemental affidavit by Noreen in each case to explain the delay. This Court then directed the Office of Public Advocacy — the agency ultimately responsible for representing Akeya and Cleveland — to secure a new attorney to investigate the situation. This Court indicated that if this attorney's investigation confirmed that the delay was solely attributable to neglect on the part of Noreen and/or the law firm of Gazewood & Weiner (who had contracted with Noreen for his services), then the Office of Public Advocacy would be allowed to file a renewed motion to accept the late-filed notices of appeal in these cases, despite the length of the delays that occurred here.

Attorney Brooke Berens, a staff attorney with the Office of Public

Advocacy, was assigned to Akeya's and Cleveland's cases. Berens filed renewed motions to accept the late-filed notices of appeal in both cases. According to the motions and accompanying affidavits, Berens investigated the cause of the delay, reviewing the files and pertinent hearings and speaking with Calvin Akeya, Christopher Cleveland, Robert Noreen, Jason Weiner (the managing partner of Gazewood & Weiner), and Chad Holt, the director of the Office of Public Advocacy.

With regard to Akeya's late-filed notice of appeal, Berens confirmed that Akeya had informed Noreen at sentencing that he wanted to appeal. The audio recording of the sentencing hearing in Akeya's case corroborated that Noreen had spoken to Akeya about appealing and that Noreen understood that it was his responsibility to file the paperwork, even if he was not going to be the attorney on the appeal. According to Berens's motion, Akeya called Noreen at least once after the sentencing hearing to discuss the appeal, and Noreen again confirmed that he would file one. The next time Akeya heard from Noreen was when Noreen mailed him a copy of the documents he filed to try to open the appeal — over two years after the sentencing. Akeya called Noreen to thank him.

With regard to Cleveland's late-filed notice of appeal, Berens confirmed that Cleveland and Noreen had initially discussed an appeal at the end of trial, before sentencing, and that they had discussed the matter again at sentencing, at which point Cleveland indicated that he wanted to appeal his convictions and his sentence. There was also a meeting at the jail in which they discussed the appeal. According to Berens's motion, Cleveland called Noreen several times after sentencing inquiring about the appeal and Noreen assured Cleveland that he was working on opening it. Cleveland also inquired in May or June 2018 about the status of the appeal. Noreen informed Cleveland

that the appeal was ongoing and mailed Cleveland a copy of the motion he filed in June to accept the late-filed notice of appeal.

According to Berens, the investigation had shown that the late filing was due solely to ineffective assistance of counsel, and nothing in her investigation suggested that the late filing was attributable to Akeya or Cleveland in any way. She therefore requested that this Court grant the renewed motion to accept the late-filed appeals, despite the fact that they were filed outside the 60-day window contemplated by Appellate Rule 521.

Policy considerations and the State's opposition in the current cases

Historically, this Court has allowed defendants to file late notices of appeal, even outside the 60-day window, when the uncontested facts demonstrated that the delay was caused by ineffective assistance of counsel. *See, e.g.*, *Custer v. State*, File No. 11901 (124 days late; State took no position); *Stacy v. State*, File No. 12668 (75 days late; no opposition by the State); *Hoehne v. State*, File No. A-12815 (222 days late; State took no position); *Backford v. State*, File No. A-12995 (91 days late; no opposition by the State); *Nyako v. State*, File No. A-13157 (393 days late; no opposition by the State). This Court has also previously accepted late-filed notices of appeal, even over the State's opposition. *See, e.g.*, *Byrd v. State*, File No. A-11443 (142 days late; accepted, over State's opposition based on Appellate Rules 502(b) and 521, due to the uncontested nature of counsel's ineffectiveness).

This policy derives from the fact that an attorney who fails to file a notice of appeal after being instructed to do so by the defendant is considered *per se* ineffective

under both state and federal law. *See Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *United States v. Witherspoon*, 231 F.3d 923, 926 (4th Cir. 2000); *Harvey v. State*, 285 P.3d 295, 297 (Alaska App. 2012). As the United States Supreme Court explained in *Roe v. Flores-Ortega*, "filing a notice of appeal is a purely ministerial task," and "a defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice." *Flores-Ortega*, 528 U.S. at 477.

Moreover, where it is uncontested that a defendant timely asked for an appeal to be filed, and their attorney failed to complete the simple ministerial task of filing a notice of appeal, no additional showing of prejudice is required. Instead, prejudice is presumed under these circumstances. *Flores-Ortega*, 528 U.S. at 483; *United States v. Snitz*, 342 F.3d 1154, 1156 (10th Cir. 2003) (presuming prejudice where counsel disregarded defendant's specific instructions to appeal and finding it irrelevant that defendant's attorney conceded that any appeal would be futile).

In other words, a defendant is not required to show that the appeal, if it had been timely filed, would have been successful. Instead, the defendant is only required to show that (1) they made their desire to appeal evident to their attorney, and (2) their attorney's negligence resulted in forfeiture of that right to appeal. *See Flores-Ortega*, 528 U.S. at 485; *see also Broeckel v. State*, 900 P.2d 1205, 1208 (Alaska App. 1995) (holding that prejudice is presumed when ineffective assistance of counsel consists of an attorney's failure to preserve the right of a client to appeal and that automatic remedy in such instances is restoration of the right to appeal).

In Akeya's and Cleveland's cases, however, the State has opposed this Court granting any relief. Despite an invitation to do so in Akeya's case, the State has

not indicated that it disputes any of the underlying facts. Nor has it offered any reason to disbelieve Noreen's admissions of professional neglect — admissions that are directly against Noreen's personal interest and have resulted in this Court referring these two matters to the Alaska Bar Association.

Instead, the State's position appears to be that, even when the attorney neglect is uncontested and the legal remedy is clear, the defendant must nevertheless pursue this remedy through an application for post-conviction relief in the lower courts. According to the State, this Court cannot accept any appeal that is over the 60-day limit, even when doing so is in the interests of justice and judicial economy.

We disagree. Given the circumstances presented here, we conclude that we should be guided by the Alaska Supreme Court's decision in *Amos v. State*, 46 P.3d 1044 (Alaska 2002). In *Amos*, it was uncontested that a defense attorney had improperly neglected to pursue a sentence appeal on behalf of his client — taking no action to pursue the sentence appeal until after this Court issued our initial decision in Amos's case. *See id*. at 1045.

This Court initially denied Amos's attempt to brief the sentencing issue after his case returned to the Court. But a majority of the supreme court held that, in these circumstances, an appellate court has the authority to grant relief without requiring the defendant to file an application for post-conviction relief in the trial court. *Amos*, 46 P.3d at 1046. The supreme court concluded that the appellate attorney's affidavit admitting the attorney's own negligence constituted "conclusive evidence" of the attorney's incompetence. *Id.* Given the attorney's concession that he was at fault in failing to pursue the sentence appeal, the supreme court concluded that it would be an

inefficient use of judicial resources to require Amos to litigate a petition for post-conviction relief in the trial court. *Id.*

These same considerations govern Akeya's and Cleveland's cases. It is at this point undisputed that Akeya and Cleveland both timely told their attorney that they wished to appeal, and it is further undisputed that the failure to file a timely notice of appeal in both cases was the fault of their attorney (and, potentially, of the law firm that subcontracted for this attorney's services). The State has not requested an evidentiary hearing on any of these facts nor does there appear to be any material facts that are in dispute. *Cf. Jordan v. Watson*, 407 P.3d 497, 498 (Alaska 2017) ("[An evidentiary] hearing is not necessary if there is no genuine issue of material fact before the court.") (internal quotations and citations omitted).

What is clear, however, is that requiring a post-conviction relief proceeding when there are no material facts in dispute would lead to further delay — delay that is against the interests of everyone involved in the criminal justice system, including crime victims and the State itself. It is also clear that it would lead to some administrative difficulties for the trial court. Because defendants are only entitled to one application for post-conviction relief challenging their convictions, *see* AS 12.72.020(a)(6), the attorneys assigned to such post-conviction relief cases would need to either (1) review the entire criminal record in order to determine whether there are other issues that should be simultaneously raised and litigated (at the risk of being forfeited), or (2) request that the post-conviction relief proceeding be bifurcated — with litigation on the late-filed appeal occurring immediately and litigation on all other claims potentially being stayed for years during the pendency of the appeal. Either option would seemingly only exacerbate the significant backlog of post-conviction applications currently pending in

the trial courts. *See Uniform Administrative Order Establishing a Statewide Central Calendaring Judge for Criminal Rule 35.1 Cases Assigned to Certain Public Defender Agency/Office of Public Advocacy Counsel* (eff. Feb. 15, 2017), *available at* https://public.courts.alaska.gov/web/jord/docs/calendar -cases2-17.pdf.

Given all this, we conclude, similar to the supreme court in *Amos*, that post-conviction relief litigation is not required when it will serve no purpose other than to increase the delay that has already occurred. Here, the real question is not whether we have the authority to *hear* an appeal that is filed beyond the limit set out in Appellate Rule 521 as a result of attorney neglect. The question is whether we have the procedural authority to accept such an appeal when the facts of the attorney's neglect are undisputed. We conclude that we do.

Accordingly, absent notice from the State that it intends to contest the underlying facts in the renewed motions to accept late-filed appeals, we intend to accept the late-filed notices of appeal in these cases and to proceed with a briefing schedule.

For these reasons, IT IS ORDERED:

1. On or before May 10, 2019, the State shall advise this Court if it wishes to contest the factual assertions contained in the pleadings related to Akeya's and/or Cleveland's motions to accept late-filed appeal. If so, this Court will remand the pertinent case(s) to the trial court with directions to convert the motion into an application for post-conviction relief, allow for bifurcation of this issue from any other post-conviction relief issues that Akeya or Cleveland may wish to pursue, and expedite action on this matter.

2. If the State does not file any further response on or before May 10, 2019, this Court will affirm the single-judge order granting Akeya's and Cleveland's renewed motions to accept late-filed appeal.

Entered at the direction of the Court.

Clerk of the Appellate Courts

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Sarah E Anderson, Deputy Clerk

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